probability reach the same conclusion that the majority reached in the Colorado case.

The situation in the Wisconsin court is much the same as that in England. In *Vennen* v. *New Dells Lumber Co.*, 161 Wis. 370, it was held that a laborer contracting typhoid fever by drinking impure water was injured by accident because the affliction was attributed to the undesigned and unexpected presence of bacteria in the drinking water. The principal difference between the majority and the dissenting opinions seems to be that the latter emphasized the fact that no external violence occurred. The Wisconsin Industrial Commission has held that a gradually acquired occupational disease is not an accidental injury within the meaning of the act. *Derkindern* v. *Rundle Mfg. Co.*, Rep. Wis. Indus. Comm. (1914-15) 16.

The California court expressed the reason for the many conflicting views on the subject when it said that in workmen's compensation cases it gave the phrase "sustained by accident" a broad construction in harmony with the spirit of liberality in which the statute was conceived. *Fidelity Co.* v. *Commission*, 177 Cal. 614. This spirit of liberality is described in *Ross* v. *Erickson*, 89 Wash. 634, where the court said that injustice to the laborer and hardships to the industries of the state alike called for some plan that would relieve the servant of the necessity of pursuing his remedy in the courts and subjecting himself to all the harassments, vexations, and uncertainties attending a trial. The laws are designed to protect the workman, but the courts will not allow them to be used to mulct the employer and the public. It is for this reason that vocational diseases are not included within the statutes, because the cause of the injury is not traceable with reasonable certainty by any reliable method of proof. To allow such speculative claims would be to encourage fraudulent practices and would contribute to defeating the broad purposes underlying the compensation laws. The question whether the cause of the injury is traceable by any reliable method of proof should, therefore, determine whether recovery should be allowed under the "sustained by accident" clause. It is by this test that it must be decided whether an unexpected and unintentional injury constitutes an accident or whether actual physical violence is necessary. See 14 COL. L. REV. 563, 648. C. G. B.

LICENSES—ORDINANCE AUTHORIZING COMMISSIONER TO REVOKE SOFT DRINK LICENSE INVALID.—The city of Tacoma passed an ordinance creating a license department in the department of public safety, which provided for licensing and regulating soft drink and candy stores. The ordinance arranged for the means of securing such a license and then enacted: "The license of any business mentioned in this section may be revoked by the commissioner of public safety in his discretion for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary. Such revocation shall be subject to appeal to the city council, to be prosecuted by filing a written notice with the council within

ten days after the revocation. Upon receipt of such appeal the council shall appoint a day for hearing the appeal, giving the appellant at least three days' prior notice in writing thereof. The decision of the council shall be final." M, being the possessor of a duly issued license under this ordinance to carry on the business of selling soft drinks and candy, had established such a business. The commissioner of public safety, being of the opinion that the business as conducted by M had become a menace to "the preservation of public morality, health, peace, and good order," assumed to revoke the license. M challenged the validity of the act. *Held,* the ordinance is unconstitutional. *State ex rel. Makris* v. *Superior Court of Pierce County,* (Wash., 1920), 193 Pac. 845.

The court held that the effect of this ordinance was to place in the hands of the commissioner of public safety, and in turn in the hands of the city council upon appeal from the commissioner, the arbitrary power, uncontrolled by any prescribed rule of action, to decide who may and who may not engage in and carry on the lawful business of selling soft drinks in the city.

It is submitted that from what appears in the report of the case the decision is wrong. In the lower court a trial was had on the merits, which resulted in the court denying relief to the plaintiff. It must, therefore, have been found that the commissioner did not act arbitrarily, and that he did not discriminate against the plaintiff. The evidence must have satisfied the court that the plaintiff conducted his business in such a way as to be a menace to "the preservation of public morality, health, peace, and good order." It is to be noticed that there is no allegation or evidence that the commissioner acted arbitrarily or with the intention of unjustly discriminating against the plaintiff.

It is also interesting to notice that the court cites the leading case of *Yick Wo* v. *Hopkins,* 118 U. S. 356, in support of its decision. This case is frequently cited by courts and text writers as an authority for the proposition that an ordinance which vests a purely personal and arbitrary power in the hands of a public official is a denial of due process of law. That case involved an ordinance which required all persons desiring to establish laundries in frame houses to obtain the consent of certain officials. Yick Wo, a native of China, who had conducted a laundry in a wooden building for twenty-two years, and who had complied with all existing regulations for the prevention of fire and the protection of health, was refused such consent, upon his application; and he was convicted and imprisoned for conducting his laundry without such consent. His petition for a writ of *habeas corpus* was denied by the state supreme court and he appealed to the United States Supreme Court. It is difficult to tell from the report just what the court decided. There is some language in the opinion to justify the conclusion that the court held the ordinance unconstitutional on the sole ground of vesting an arbitrary discretion in a public official. The court says: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoy-

ment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." In regard to the ordinances the court says: "They seem intended to confer and actually do confer, not a discretion upon consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The effect of the above passage is weakened somewhat as the evidence in the case showed that the ordinance in actual operation had been directed exclusively against the Chinese. The evidence showed "an administration directed so exclusively against a particular class of persons as to warrant the conclusion that, whatever may have been the intent of the ordinances so adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the law which is secured to the petitioner as to all other persons by the broad and benign provisions of the Fourteenth Amendment." The court then goes on to say: "Though the law be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

However, it is submitted that a careful analysis of the case shows that the court did not declare the ordinance unconstitutional, either because it vested an arbitrary power in the hands of a public official or because the evidence showed a wanton and wilful discrimination by the persons charged with its administration against a particular class of persons. It merely decided that the petitioner could not be punished under the ordinance. But as the Supreme Court has never been called upon since to determine exactly what was decided by the court in *Yick Wo* v. *Hopkins*, there must be more or less speculation about it.

Two years before the decision in *Yick Wo* v. *Hopkins, supra*, the Supreme Court decided in *Barbier v. Connolly*, 113 U. S. 27, that an ordinance of the city of San Francisco providing that no person should carry on the business of a public laundry within certain limits without a certificate from the health officer, and another certificate from the Board of Fire Wardens, was valid. The Connecticut court in *Ex parte Fiske*, 72 Conn. 125, reconciles these cases by saying: "A correct understanding, however, of the extent to which that case goes (*Yick Wo* v. *Hopkins*) can be had only by considering that the proof, which the court looked into, showed that the ordinance there under review was so administered as to exclude the subjects of the emperor of China, and no others, from the business of keeping a laundry. * * * It is evident from the language that the decision

rested mainly upon the admitted discrimination against a class of persons in the public administration of the ordinance. The decision, therefore, as an authority, goes no further than to hold that, under a state of facts similar in character to the facts of that case, an ordinance similar in character to the one there passed on would be invalid."

There are no such facts in the principal case. There is no evidence that there was any discrimination in the administration of the ordinance against the plaintiff. On the contrary, the case was tried on its merits, and the trial court refused to grant the plaintiff any relief. It is true that under the ordinance in question the commissioner is given considerable discretion in determining what was a menace to "the preservation of public morality, health, peace, and good order." But could the legislature prescribe a more definite rule of action? It seems obvious that the legislature could not define all the circumstances and conditions which would be a menace "to the preservation of public morality, health, peace, and good order." It seems that in the very nature of things the determination of what conditions come within the general rule must be left to an administrative officer.

The cases are in conflict on this question of the validity of statutes and ordinances conferring unrestrained discretion. Many courts have upheld ordinances similar to the one in the principal case. In *Wilson* v. *Eureka City,* 173 U. S. 32, the court upheld an ordinance which forbade any person moving a frame building owned by him without the written permission of the mayor. The court approves the summary of cases in *Re Flaherty,* 105 Cal. 558, in which unrestrained discretion is sustained, and declare that discretionary power is "based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor." In *Williams* v. *Mississippi,* 170 U. S. 213, it was held that no relief could be granted against a law merely because it confers a discretion readily susceptible of abuse, if no actual discriminatory administration is shown. In *People* v. *Van De Carr,* 199 U. S. 552, after citing a number of cases sustaining a delegation of discretion to a board, the court says: "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of the federal court," citing *Yick Wo* v. *Hopkins, supra.* In *Davis* v. *Massachusetts,* 167 U. S. 43, an ordinance of the city of Boston providing that "no person shall, in or upon any of the public grounds, make any public address," etc., "except in accordance with a permit from the mayor," is valid. These cases would seem to indicate that the Supreme Court of the United States is committed to the doctrine that administrative

officers may be given discretionary power to act according to their own unrestricted judgment, and that an ordinance or law granting this authority is not, upon its face, void. In *Commissioners of Eaton* v. *Covey*, 74 Md. 262, an ordinance was sustained requiring a permit from the commissioners for the erection of a building in the city; in *Kessinger* v. *Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005, an ordinance was upheld requiring hackmen to secure a license to use the streets as a public stand, reserving to the municipal authorities the discretion to say who shall and who shall not have permits; in *Ex parte Bogle* (Tex.), 179 S. W. 1193, an ordinance giving the city authorities discretionary power to grant or refuse a license for operating a jitney was upheld; in *Laurelle* v. *Bush*, 17 Cal. App. 409, 119 Pac. 953, an ordinance giving the police commissioner power to grant or refuse a permit to operate a moving picture show was upheld, although it did not prescribe methods for its application. The court said: "It is a well recognized rule of statutory construction that a general grant of power, unaccompanied by specific direction as to the manner in which the power is to be exercised, implies a right and a duty to adopt and employ such means and methods as may be reasonably necessary to a proper exercise of the power. * * * Tested by this rule, it cannot be said that the board of police commissioners is vested with an undefined and whimsical discretion in the matter of granting or refusing a permit."

Not every act giving an arbitrary discretion to an administrative officer should be upheld, but in passing upon questions of this character practical considerations and the necessity of administrative efficiency should be considered. In these days, when the extent of governmental functions has become so great and complicated, it seems that about all the legislature can do is to declare the general policy of the law, and leave its enforcement and application to the discretion of some official. It is presumed such discretion will be exercised honestly. It seems reasonable that the courts should interfere with the exercise of such discretion only when it is alleged and proved that this discretion has been abused. See 19 MICH. L. REV. 211; also, FREUND, POLICE POWER, Secs. 642-655. A. G. B.